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1 [The R.M.C. 806 session was called to order at 0904, 26 March
2 2019.]

3 MJ [Col PARRELLA]: Good morning. This commission is
4 called to order for the purpose of this closed session
5 pursuant to R.M.C. 806.

6 Trial Counsel, if you could please identify who is
7 here on behalf of the government and whether they hold the
8 appropriate clearances.

9 CP [BG MARTINS]: Good morning, Your Honor.

10 MJ [Col PARRELLA]: Good morning.

11 CP [BG MARTINS]: Present for the United States, Brigadier
12 General Mark Martins, Mr. Robert Swann, Mr. Edward Ryan,
13 Mr. Clayton Trivett, Ms. Nicole Tate, Major Christopher
14 Dykstra. Also present in the courtroom, Mr. Dale Cox, and on
15 the securing the entrances are Mr. Rudy Gibbs and Staff
16 Sergeant Clifford Johnson. All personnel have the necessary
17 clearances.

18 MJ [Col PARRELLA]: Thank you, General Martins.

19 Mr. Nevin.

20 LDC [MR. NEVIN]: Good morning, Your Honor. David Nevin
21 for Mr. Mohammad, with Lieutenant Colonel Poteet, Ms. Leboeuf,
22 Mr. Sowards, Ms. Radostitz, and Mr. [REDACTED] is present as well.

23 And I will be articulating the same objection that I

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1 articulated yesterday in the same way and for the same
2 reasons.

3 MJ [Co1 PARRELLA]: I understand. But all of your folks
4 have the requisite clearances?

5 LDC [MR. NEVIN]: Sorry. Yes, Your Honor, they all do.

6 MJ [Co1 PARRELLA]: Ms. Bormann, good morning.

7 LDC [MS. BORMANN]: Good morning, Judge. I am Cheryl
8 Bormann on behalf of Mr. Binalshibh. With me today is Edwin
9 Perry, Mr. William Montross, Captain Simon Caine, Mr. Michael
10 Garber, and Major Matthew Seeger.

11 MJ [Co1 PARRELLA]: And everybody has the requisite
12 clearances, Ms. Bormann?

13 LDC [MS. BORMANN]: Yes. I always forget to say that.
14 Yes.

15 MJ [Co1 PARRELLA]: Thank you.

16 Good morning Mr. Harrington.

17 LDC [MR. HARRINGTON]: Good morning, Judge. On behalf of
18 Mr. Binalshibh, James Harrington, Wyatt Feeler, Captain John
19 Balouziyeh, and Douglas Oliver, all of whom have their
20 requisite clearances.

21 MJ [Co1 PARRELLA]: Thank you, Mr. Harrington.

22 Mr. Connell, good morning.

23 LDC [MR. CONNELL]: Good morning, Your Honor. On behalf

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1 of Mr. al Baluchi: Myself; LN1 [REDACTED] Alka Pradhan;
2 Benjamin Farley; Captain Mark Andreu, United States Air Force;

3 [REDACTED]

4 [REDACTED]

5 Before I state that we all have the requisite
6 clearances, I do want to say that in order to answer your
7 question from yesterday about security classification guides,
8 I will need to briefly address the scope of the ACCM. So I
9 have been asked before whether -- to alert the parties when I
10 think that ACCM material will come up.

11 With that said -- so I am doing so. With that said,
12 all the people here from my team have the requisite
13 clearances.

14 MJ [Col PARRELLA]: Thank you, Mr. Connell.

15 CP [BG MARTINS]: Your Honor, the government would like to
16 confirm which additional compensatory control measure he is
17 speaking of.

18 LDC [MR. CONNELL]: Can I say it?

19 CP [BG MARTINS]: Yes, you can say it. The nickname is
20 unclassified.

21 LDC [MR. CONNELL]: [REDACTED]

22 CP [BG MARTINS]: Okay.

23 MJ [Col PARRELLA]: Mr. Nevin?

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1 LDC [MR. NEVIN]: Your Honor, I inadvertently left out one
2 of our team members who is sitting in the back, Derrick
3 Chapman; and he also possesses all of the appropriate
4 clearances.

5 MJ [Col PARRELLA]: Thank you, Mr. Nevin.

6 Mr. Ruiz, good morning.

7 LDC [MR. RUIZ]: Good morning, Judge. Ms. Suzanne
8 Lachelier, Lieutenant Colonel Jennifer Williams, Lieutenant
9 Commander Dave Furry, Major Joseph Wilkinson, Mr. Sean
10 Gleason, Mr. [REDACTED] Technical Sergeant [REDACTED]
11 [REDACTED] and myself are here on behalf of Mr. al Hawsawi. And
12 we all possess the requisite clearances.

13 MJ [Col PARRELLA]: Thank you, Mr. Ruiz.

14 And I will also note for the record that General
15 Baker is in the back of the courtroom, who the court believes
16 has the requisite clearances.

17 CDC [BGen BAKER]: I do, sir.

18 MJ [Col PARRELLA]: Thank you.

19 And with that, we will go ahead and take up the first
20 item in the order of march, which is 133RR, but I do believe
21 we've resolved that. So unless any party wants to be heard in
22 this closed session, I don't think we need to take that up.

23 Mr. Connell.

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1 LDC [MR. CONNELL]: We concur, sir.

2 MJ [Col PARRELLA]: General Martins?

3 CP [BG MARTINS]: Your Honor, the commission had a
4 question about whether follow-up actions in the Technical
5 Surveillance Countermeasures Report had been completed, and I
6 think that is pertinent to the motion, so I would like to give
7 that update, which I can do in this forum.

8 So if I could direct counsel and the commission to
9 Appellate Exhibit 133BBB of 12 November 2018. The government
10 provided the Pentagon Force Protection Agency Technical
11 Surveillance Countermeasures Report of Inspection of 8
12 November.

13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]

20 MJ [Col PARRELLA]: Thank you. Actually, the portion I
21 was referring to that hadn't been completed, and I no longer
22 have the report here in front of me, [REDACTED]

23 [REDACTED]

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2 CP [BG MARTINS]: Right. That was the second item I was
3 going to update you on.

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12 So they are still trying do that. They are working
13 with the Office of Military Commissions Convening Authority to
14 do it.

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22 MJ [Col PARRELLA]: Thank you.

23 LDC [MR. CONNELL]: Sir?

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1 MJ [Co1 PARRELLA]: Mr. Connell.

2 LDC [MR. CONNELL]: With respect to that last point, we
3 are close to finished with the order.

4 MJ [Co1 PARRELLA]: Hold on one second, please.

5 [Pause.]

6 MJ [Co1 PARRELLA]: For the record, Ms. [REDACTED] has entered
7 the courtroom.

8 And, Mr. Connell, you may continue.

9 LDC [MR. CONNELL]: Thank you, sir.

10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]

15 I just wanted -- but we all said it on the record
16 yesterday. [REDACTED]

17 [REDACTED]

18 CP [BG MARTINS]: The unclassified paragraph with which we
19 could draw no detection of [REDACTED]
20 audio-monitoring capability is on page 2, at the end of the
21 summary. [REDACTED]

22 [REDACTED]
23 [REDACTED]

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1 So if we've paraphrased that paragraph, Mr. Connell,
2 on the last paragraph of the summary, and it's on page 2.
3 Sure.

4 LDC [MR. CONNELL]: Let me see. That's fine with me. I
5 want to make certain what I was concerned about.

6 CP [BG MARTINS]: Yeah, that has other, you know,
7 additional language in it. I don't know the thing, but if we
8 use this paragraph, there won't be any problem.

9 LDC [MR. CONNELL]: Resolved, sir.

10 MJ [Col PARRELLA]: Okay. And just since you weren't in
11 front of the microphone, I will just summarize you indicated
12 that your concern was resolved.

13 LDC [MR. CONNELL]: Sure. In looking -- I'm sorry, I said
14 "resolved," but -- yes, we can make that work. Thank you.

15 MJ [Col PARRELLA]: You're welcome. Okay.

16 With that, let's move on to 118. Please proceed.
17 Thank you.

18 LDC [MR. CONNELL]: Your Honor, there are three aspects of
19 118 that are classified that I think remain relevant, and they
20 all relate to the question of security classification guides,
21 what of them exists.

22 The first element of that -- and I told you that we
23 had been working on this question for a long time -- is

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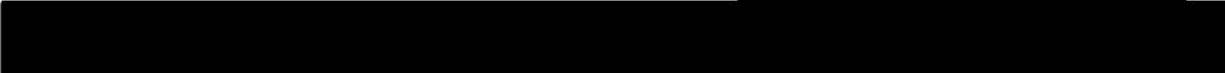
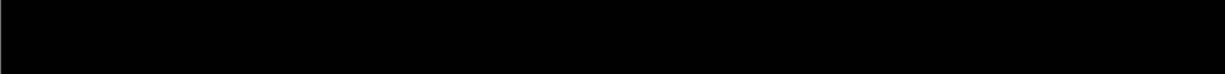
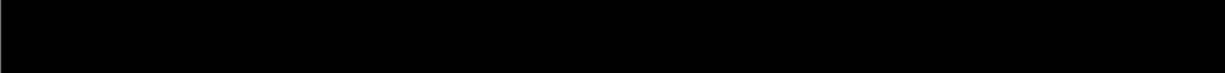
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1 reflected in AE 118C, and that is, in 2000, following the
2 October hearing in this military commission at which the
3 question of the security classification guides first came up,
4 I had a meeting at the Pentagon personally and was told that
5 classification guides exist, but that the Department of
6 Defense had made an intentional decision not to provide them
7 to the defense so that we could not -- let me state it a
8 different way, with the recognition that that meant that we
9 could not perform duties as derivative classifiers.

10 I was shown a SECRET//NOFORN memorandum to that
11 effect, but was -- they would not give me a copy of the -- of
12 the memo. I memorialized that in 118C.

13 The next event that occurred -- well, a lot of events
14 occurred, but the next one of significance here is
15 memorialized in AE 118G Attachment B, 

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20 The security classification guide, which was
21 presented to us in draft form, incorporated presumptive
22 classification from back in 2011. It contradicted the CIA
23 guidance that the prosecution had brought forth on two

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1 occasions in the AE 013 series and seemed to be outdated in
2 that it did not take the SSCI report into account.

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10 The last point that I want to make is in response to
11 your question about what security classification guides do I
12 feel are implicated. The military commission identified
13 SOUTHCOM, the ACCM that we mentioned on -- the existence of an
14 ACCM on the record [REDACTED] The prosecution
15 advised this morning that the name of that ACCM is
16 unclassified, although I wasn't willing to say it in open
17 session because I didn't know that.

18 The third -- and the prosecution said yesterday
19 "CIA." I want to address that one a bit. For most of the
20 case, we have operated under a [REDACTED]
21 [REDACTED] That program is administered under the
22 auspices of the National Security Council, which is why we
23 have to put a national -- we had to put a National Security

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1 Council cover sheet on them.

2 We have received conflicting information over the
3 years about the relationship of the actual CIA to that
4 compartment, but one thing is clear, that it is now being
5 administered by -- administrative parts of it are being
6 administered by national programs; and I understand that at
7 least a DoD version of it is under the custody or control of
8 Under Secretary of Defense for Intelligence.

9 So I say -- my information on that topic is
10 conflicting, folklorish, and confused. So all I mean to say
11 on that is that there is a lot of conflicting information
12 about who owns that SAP and who administers it, but there
13 seems to be a lot of fingers in that pie.

14 The reason why that is important is because of
15 606 Attachment B, which was filed by the government about a
16 change in the status of the SAP. In Attachment B to 606,
17 which is styled as an update to prior CIA guidance, it is
18 stated that the five components of classified RDI information
19 which are reflected in the protective order have now been
20 removed from the SAP. Although they remain classified at the
21 TOP SECRET level, [REDACTED]

22 [REDACTED]

23 The memorandum further advises, however, that

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1 information related to the existence or, if you will,
2 nonexistence of hostilities between the United States and
3 al Qaeda in -- prior to September 11th does remain within

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7 The tremendously confusing part of that transition is
8 that the requirement of a SAP clearance is still enforced by
9 this military commission for presence in the courtroom and by
10 JTF for visiting the defendants. Although -- although the
11 defendants do have information about their rendition,
12 detention, and interrogation, they have no information

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20 MJ [Col PARRELLA]: How does that relate to the need for a
21 security classification guide?

22 LDC [MR. CONNELL]: Because we need to know what the scope

23  That's the answer.

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1 MJ [Col PARRELLA]: Why not just ask that to the
2 government in a way that there has been past dialogue about
3 seeking security guidance or security classification guidance?

4 LDC [MR. CONNELL]: We have asked a lot of people. I'll
5 leave it there. No one has an answer. My own personal view
6 is it's probably a legacy, but that's why -- that's the
7 relevance of that piece of it.

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11 I don't know if any
12 information that we have falls into it or not. It may be
13 irrelevant to us. I don't know. And that's all I have.

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MJ [Col PARRELLA]: I have a few questions for you.
What's the issue with what your request is for a
security classification guide? What's the issue with just
using the source material? So in putting your pleadings
together and submitting things to the commission or making
your decisions, just using the source -- the markings that are
on the source material provided to you by the government?

LDC [MR. CONNELL]: Sure. We do that all the time.
That's routine. 70, maybe 85, 90 percent of the time, we just
use pass-through markings. So I don't want to claim that
there is a problem with that. There is no problem with that.

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1 We do it routinely virtually every day.

2 The place where there has been so much difficulty,
3 however, the place where most spills have come from is
4 elements of -- that turn out to be classified that we never
5 knew, and those usually turn out to be combinations.

6 Now, when we were just discussing the reason why one
7 paragraph was marked U//FOUO and another paragraph was marked
8 SECRET//NOFORN, General Martins observed, well, the second
9 paragraph has a little more language in it. And that seems to
10 be the problem. It seems to be that when you put one word
11 together with another word, that things become classified, and
12 we don't know that in advance.

13 Now there are things that are obvious to us, right?
14 We can't -- except for unless they have been identified for
15 the government, [REDACTED]

16 [REDACTED] I mean, there's lots -- there is plenty on the
17 classified side of the line that we understand, but there
18 seems to be a significant gray area between the clearly
19 unclassified and the clearly classified that we keep running
20 into.

21 MJ [Col PARRELLA]: And I understand that. So -- and I,
22 of course, don't know if a security classification guide
23 exists or, if it does, what it looks like, so this is largely

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1 speculation. But I would think that there is no guide that
2 perhaps envisions every scenario in combination of this word
3 with that word, this paragraph with that paragraph. And so
4 perhaps the OCA wants to retain the authority to look at it to
5 decide in this unique scenario whether that remains
6 classified, changes the classification, something along those
7 lines.

8 Do you see there is a problem with the OCA retaining
9 that authority rather than providing you a guide which may
10 give you the perception that you now have that authority to
11 make those discretionary decisions?

12 LDC [MR. CONNELL]: So a few different concepts on that.
13 First, the OCA always retains the authority. Nothing that I
14 could do or frankly, sir, you could do would strip the OCA of
15 that authority under Executive Order 13526.

16 Second, the security classification guides that I
17 have seen, which tend to be old and in different areas, right,
18 you know, much more mundane military areas, often do -- tend
19 to be -- the ones that I have seen -- and I do not claim to be
20 an expert -- tend to be set up as a spreadsheet providing
21 categories, subcategories on, say, down the rows and on the
22 columns providing when -- when combined with this other
23 information or it's at this, it's Confidential and not Secret,

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1 but if you say this, then it becomes Secret. And the ones
2 that I have seen have been fairly specific.

3 Obviously one can always -- there is an infinite
4 regression to it when one can always look for something more
5 specific. And I am not saying that. I'm saying that they are
6 at a reasonable level of specificity. That may exist or not
7 exist; I don't know.

8 Third, and maybe -- I'm going to add a fourth. So
9 third, the memorandum that was shown to me during the meeting
10 in 2012 would be consistent with that view, that although the
11 executive order gives derivative classifiers not discretion --
12 because the idea with the security classification guide is to
13 take away discretion and promote uniformity -- not discretion
14 but authority to use an additional source other than
15 pass-through markings, and that's that 10 or 15 percent that I
16 am talking about where we don't know.

17 It may be that the United States Government made that
18 decision, right? That is a rationale for the decision that we
19 cannot perform duties as derivative classifiers. If it were
20 true that we could not perform duties as derivative
21 classifiers, we have to stop, which is actually my abatement
22 point because we can't file.

23 I mean, if that is actually -- if someone made that

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1 decision, that's a policy decision that is entirely within the
2 authority of the United States Government to make, but it is
3 not consistent with litigation in a military commission
4 because we have to file classified pleadings all the time. To
5 do that, we have to act as derivative classifiers.

6 MJ [Col PARRELLA]: I mean -- right, I agree with that.
7 You have been doing that so far to this date.

8 LDC [MR. CONNELL]: That's right.

9 MJ [Col PARRELLA]: By probably going through the process
10 of having to submit that through your DISO to some -- you
11 know, to put it into the funnel -- the proverbial funnel and
12 get an answer; is that accurate?

13 LDC [MR. CONNELL]: Let me address that, actually, because
14 that was going to be my fourth point.

15 DISO, absolutely. We rely -- the military
16 commissions -- I thought it was funny the government claimed
17 yesterday that they gave us the DISOs when they fought like
18 crazy to stop it, including negotiating with me privately to
19 try to stop it, but the -- but it was the military commission
20 who ordered those DISOs, and they have been extremely
21 valuable. They have saved -- I think that they have protected
22 national security, I think they are consummate professionals,
23 and I greatly appreciate their work.

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1 They are an integral part of every filing that we do
2 on team (AAA), and I cannot -- when you say "give their role,"
3 I cannot credit that role enough.

4 The second part of what you said, however, is not
5 accurate. The classification review process takes so long
6 when we submit it. And I don't mean 10,000 pages in a giant
7 funnel; I mean three pages, four pages, that only on one
8 occasion have we submitted a set of motions for classification
9 review prior to filing them. That's already a matter of
10 record in this court.

11 That's the 609, 610, 612, '13, '14 series, because
12 the reason why that happened is that we attempted to submit
13 them for filing. The markings on the discovery that we had
14 received from the government were so irregular that the court
15 information security officer declined to take them unless they
16 were submitted for classification review. That was in June of
17 2017, I think. And then in October of that year, which I'm
18 pretty sure is 2017, we received them back from security
19 classification review and put them -- and filed them with the
20 court, along with footnotes already in the record, explaining
21 this process.

22 But even in that process, Your Honor, those did not
23 actually get classification review. They received a blanket

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1 blessing that the CISOs relied on, that despite the extreme
2 irregularity of the markings -- one of them was marked
3 TOP SECRET//SECRET. Despite the irregularity of the markings,
4 that we could go ahead and file. That seemed to be a policy
5 decision that was made and not a true security classification
6 decision that was made, but for my purposes, it was either
7 way. They said I could file, and so I filed.

8 But the reason why I am telling you this story, which
9 is already a matter of record in this military commission, is
10 to demonstrate that if the OCAs want to retain the discretion
11 in close calls -- because that's what we are talking about
12 right here, is the close call. If they want to retain that in
13 the close call, they are going to have to either devote more
14 resources or act with more dispatch or something.

15 I read in your ruling in 551 the -- the instruction
16 that we could file, out of an abundance of caution, at a
17 higher level system 15 days after submitting a document for
18 classification review along with the certification that we had
19 submitted it more than 15 days ago.

20 I chuckled to myself when I read that because 15 days
21 is at least an order of magnitude smaller than how long it
22 takes our material to go through the classification review
23 process. And this is a matter of record in the military

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1 commission already, and I can provide examples, but a year is
2 not uncommon.

3 MJ [Co1 PARRELLA]: Let me ask -- on that topic, and
4 having read a transcript that obviously was a year or two ago
5 when it was actually argued, is it your view that the process
6 has sped up, slowed down, or remained the same?

7 LDC [MR. CONNELL]: The classification review process?

8 MJ [Co1 PARRELLA]: Correct.

9 LDC [MR. CONNELL]: My view is that it has always been
10 slow. There was a personnel matter at the -- the person who
11 was responsible for this at Office of Special Security left
12 last year or -- I don't know where she went. I don't want to
13 get involved in that, but there was a person who was primarily
14 responsible for the varying material between places. That
15 person was no longer in that office. It so happens that now,
16 very recently, that person is back.

17 This is a long way of answering your question, but it
18 has always been slow. The past year has been especially bad.
19 That could change slightly, but it's not consistent with the
20 use of the classification review process as an adjunct to the
21 filing of motions because as many people complain about the
22 speed of this process, if we were operating at the speed of
23 the classification review, it would be much, much, much

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1 slower.

2 MJ [Col PARRELLA]: Although we talked about some of the
3 other potential security guides that -- classification
4 security guides that could be implicated, is it fair to say
5 that the primary concern, the primary time for instance that
6 this situation comes up where you are forced to try to
7 derivatively classify your DISO is in the context of the RDI
8 program?

9 LDC [MR. CONNELL]: Yes, sir. I wanted to give a fulsome
10 answer to your question about the existence of security
11 classification guides. But that's the key problem. I would
12 tell you that it would also be very helpful to us to have some
13 guidance around -- to have the security classification guide
14 for the detention part of JTF-GTMO because it does come up
15 fairly regularly, either in litigation over conditions of
16 confinement or questions from the media, questions about their
17 conditions of confinement. And I do seek guidance, and I do
18 do my best in addressing those issues, but it would be nice to
19 have some left and right limits on that as well.

20 MJ [Col PARRELLA]: So oftentimes a security
21 classification guide may contain rationale for why something
22 is classified. Is it fair to say that what you are asking for
23 isn't necessarily that portion of it, you are just interested

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1 in the what is it that I'm supposed to put on this piece of
2 paper that I am going to submit?

3 LDC [MR. CONNELL]: Right. I could imagine the situation
4 where the why contained was like actually an application
5 guide, right? So, you know, the real -- the thing that we are
6 trying to guard against is the public knowing where the fence
7 is or something like that. Like if we are not talking about
8 application guide but we are talking about here is our
9 internal reason why we want this classified, yes, I have no
10 interest in that whatsoever. I am only interested in
11 classification.

12 MJ [Co1 PARRELLA]: I have no further questions.

13 LDC [MR. CONNELL]: Thank you, sir.

14 MJ [Co1 PARRELLA]: Thank you.

15 Any other defense counsel care to be heard on 118?
16 And I will just -- there is no need to restate your objection.
17 I am just going to assume the objection stands again,
18 Mr. Nevin, Ms. Bormann. Is that an accurate statement?

19 LDC [MR. NEVIN]: It is, Your Honor. But just for
20 purposes of the record, if you wouldn't mind letting me just
21 say "prior objection" each time. I just want to make sure
22 that there is no mistake about it in the record if that
23 becomes an issue.

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1 MJ [Col PARRELLA]: No issues.

2 LDC [MR. NEVIN]: Thank you.

3 MJ [Col PARRELLA]: Thank you.

4 LDC [MS. BORMANN]: With respect to this one, we are in
5 the same position as we were yesterday. Thank you.

6 MJ [Col PARRELLA]: All right. It doesn't appear any
7 other defense counsel cares to be heard.

8 Trial Counsel?

9 TC [MR. SWANN]: Your Honor, all the classification
10 guidance they need to do their job they have. As can you take
11 a look at the AE 606 filing that Mr. Nevin was -- excuse me,
12 Mr. Connell was addressing, that guidance is pretty clear.
13 It's a handling classification guidance in this particular
14 instance, but it is -- it is down to the very idea of what
15 remains classified within these -- within these commissions.
16 You can see it's laid out perfectly.

17 Any question that Mr. Connell might have about that
18 guidance, he was given a point of contact, by name, on the
19 first page of the filing, and he can go ask that individual
20 some of the very questions that he might have regarding this.
21 And, of course, if that individual does not have that
22 information, then he can forward it up through his chain of
23 command so that Mr. Connell can get it.

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1 Now, the government has seen no difficulty with the
2 defense filing pleadings in this case. Your filings inventory
3 right now exceeds well in excess of 320 pages. There are more
4 than 20-plus lines on each of those pages. My math says
5 that's 6500 instances they have filed matters with this court.
6 And where there have been questions about the classification
7 of those particular filings, that gets ironed out through a
8 system that is set up that the defense has available to it:
9 [REDACTED] There is
10 no need for them to have any additional classification.

11 Now, if you take a look at I think the latest
12 guidance in 606, that particular guidance is derived from the
13 very document that Judge Pohl had access to when he reviewed
14 the item in 2012, 2013, and made the determination that it was
15 not relevant or material to these particular cases.

16 MJ [Col PARRELLA]: What is it you said that Judge Pohl
17 reviewed?

18 TC [MR. SWANN]: He had access to the agency's
19 classification guide. It's derived from -- if you look down
20 on all of the pages, you will see it has been derived from
21 that [REDACTED].

22 MJ [Col PARRELLA]: Okay. And what document are you
23 referring to?

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1 TC [MR. SWANN]: I am talking about Attachment B to 606.

2 MJ [Co1 PARRELLA]: Give me one moment, please.

3 [Pause.]

4 TC [MR. SWANN]: Sir, it might be on your Secret computer.

5 MJ [Co1 PARRELLA]: All right. Mr. Swann, I unfortunately
6 don't have the Secret computer here in front of me.

7 TC [MR. SWANN]: Well, I will just make reference to it.
8 When you go back, in looking at this, you will see that ----

9 MJ [Co1 PARRELLA]: So -- one moment.

10 [Pause.]

11 MJ [Co1 PARRELLA]: Okay. So with respect to the
12 Attachment B in AE 606, your point is that Judge Pohl
13 previously reviewed this and deemed ----

14 TC [MR. SWANN]: Previously reviewed it. That's 054C, the
15 ruling where he determined that particular item was no longer
16 relevant -- it wasn't relevant or material to the defense.

17 Now, if you will also look up in the same document on
18 page 1 of Attachment B, the purpose of the guidance, the
19 second paragraph there, you will see where this particular
20 guidance here provided in 606 -- in this particular guidance
21 was previously provided to the defense in AE 013RRR (Gov)
22 attachment -- classified Attachment B. They have had that
23 guidance for at least -- well, four years now, I guess.

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1 This updates that particular guidance. As you can
2 see, over time certain items have -- that were originally part
3 of the program back in 2012 when we began this case have been
4 taken out of the program, the current guidance appears here.
5 There is no need for them to have additional items.

6 Moreover, they have no right to -- they get
7 classification -- they get classified items from two sources.
8 They get it from the United States, properly marked, or they
9 get it from their accused, and then they apply the guidance
10 they have been given as to whether that's classified. If
11 they've got a question, then they go through the DISO, through
12 the back door to the OCA, and they can get further additional
13 guidance.

14 MJ [Co1 PARRELLA]: So this back door where the DISO goes
15 to the OCA, is this separate from this process of submitting
16 and putting it through the funnel? So what's your
17 perspective ----

18 TC [MR. SWANN]: Separate.

19 MJ [Co1 PARRELLA]: So what's your perspective on how
20 responsive the DISO to OCA process is?

21 TC [MR. SWANN]: Well, because we are walled off from that
22 process, that is -- I know there are instances where they have
23 gone from the DISO to the OCA. I know of at least a single

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1 instance where the defense has indicated that it took a
2 considerable period of time, yet when they drilled down, they
3 found out that their particular DISO really hadn't submitted
4 that item to the OCA to begin with, that he simply had
5 manufactured certain documents to kind of indicate that the
6 process was in place when it was not.

7 I can tell you that the OCA, they take these things
8 seriously, and they do their job. Some things will take
9 longer than others.

10 The funnel is an entirely different process. That
11 funnel, from our perspective, was designed to jam up the
12 system.

13 MJ [Co1 PARRELLA]: Okay. Before we go to the funnel,
14 let's stick with the backdoor here.

15 So I would think when the defense receives something
16 that's classified, in certain situations, [REDACTED]
17 so there is a marking -- correct? [REDACTED]

18 [REDACTED] Is that accurate?

19 TC [MR. SWANN]: Yes, sir.

20 MJ [Co1 PARRELLA]: That's the idea behind it; is that
21 right?

22 TC [MR. SWANN]: The idea behind it?

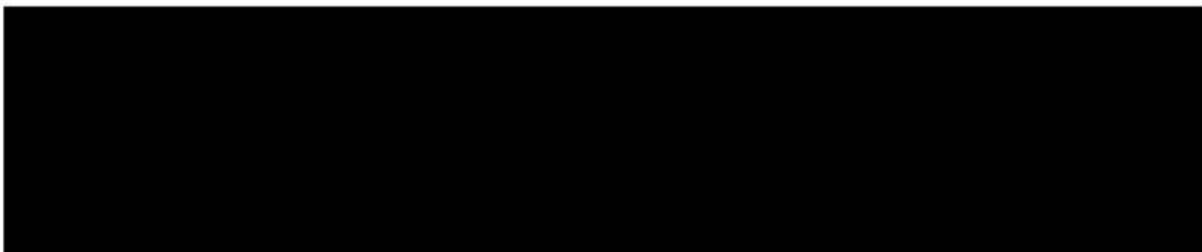
23 MJ [Co1 PARRELLA]: [REDACTED]

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5 TC [MR. SWANN]: Well, if they have that kind of a
6 question, they can reach out to us, and we can answer that
7 kind of question as well.

8 MJ [Co1 PARRELLA]: Okay. Do you need a moment,
9 Mr. Swann?

10 TC [MR. SWANN]: No.

11 [Pause.]

12 TC [MR. SWANN]: All right, sir.

13 MJ [Co1 PARRELLA]: Okay. So I guess I don't see a
14 need -- putting aside whether they are entitled to it -- and I
15 get the government's point they are not entitled to it, but I
16 don't see a need to have a mystery out there. The executive
17 order seems to require that there be a security classification
18 guide, so perhaps this is a hunt for something that, as the
19 defense theorizes, doesn't exist; or even if it does exist, it
20 may not be any more guidance than probably what's contained in
21 the protective order. So perhaps you can demystify for us
22 what else is in existence there with respect to the RDI
23 program in terms of a security classification guide.

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1 TC [MR. SWANN]: It is my belief that the guidance that
2 they have received is everything that exists with respect to a
3 security classification guide, and I base that on a couple of
4 things. Judge Pohl took a look at what he saw back in May and
5 said it didn't have any relevance to what we were doing in
6 this process; it wasn't even material to this particular
7 process.

8 Over time, because this guidance has changed, we put
9 out whatever guidance they need in order to be able to do
10 their job. We received this guidance from the OCA in
11 addressing some of the issues that come up over time.

12 MJ [Co1 PARRELLA]: So the ----

13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]

17 but ----

18 MJ [Co1 PARRELLA]: [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]

22 TC [MR. SWANN]: [REDACTED]

23 MJ [Co1 PARRELLA]: [REDACTED]

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6 TC [MR. SWANN]: I don't think anybody ever anticipated
7 that a defense organization would be entitled as a derivative
8 classifier to that particular information. I mean,
9 Mr. Connell, I don't know anything about his meetings at the
10 Pentagon or whatever he was talking about this morning, but I
11 think he got his answer way back when as to why they don't get
12 that, because he really has no need in this particular
13 instance for a classification guide because he cannot reduce
14 the classification on any item that he receives from us or
15 from -- or through the system, okay? He could ask questions
16 about it; he has that process in place. He has points of
17 contact where he can ask about certain items.

18 MJ [Col PARRELLA]: I don't take any of this to revolve
19 around a desire by the defense to reduce the classification.
20 I think it's an effort to avoid violating the classification
21 rules and regulations. Everybody is -- sort of in this room
22 has a collective interest in ensuring that they don't do that.
23 So it's a tool to use. And I guess what I am having

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1 trouble understanding is the commission has ordered that each
2 defense team has a defense security officer, but yet we
3 haven't given those individuals, whose job it is, whose
4 specialty it is, to do exactly this, access to the tools.

5 TC [MR. SWANN]: And I go back to 054C again. The judge,
6 Judge Pohl, addressed that. Following his particular -- in
7 that order, in 054C, he recognized that as a possibility, but
8 then determined that with the guidance that we provide them,
9 that is sufficient, and they can do their job. That's laid
10 out in 054C.

11 MJ [Col PARRELLA]: [REDACTED]

12 [REDACTED]
13 [REDACTED] does that relate to the RDI program or
14 would that be something completely different?

15 TC [MR. SWANN]: It relates -- well, it doesn't relate to
16 the RDI program [REDACTED]

17 [REDACTED]
18 [REDACTED]
19 [REDACTED] I think we addressed at one point in time where
20 Judge Pohl and I got into a discussion -- I believe it's in
21 the 330 series, where we got into a discussion about the
22 redaction of DIMS records and what was being redacted and what
23 wasn't being redacted.

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1 He ultimately determined that they needed additional
2 information and the accused needed additional information. We
3 went back and we got the ability to be able to do that.

4 MJ [Col PARRELLA]: So going back -- and I apologize. I
5 cut you off. But when you were starting to talk about the
6 funnel, let's go back to that, and the same question I asked
7 the defense. What's your perspective as to where we are now
8 in comparison to where we were last time when 118 was argued?
9 Have things sped up, slowed down, or remained the same?

10 TC [MR. SWANN]: I believe it's sped up considerably. If
11 you take that -- when I said 10,000 that were in the funnel, I
12 mistakenly said a number. It was actually 18,000 that they
13 dropped into that funnel. With that 18,000, the agency was
14 able to resolve that doing about 3,000 a month, so it took
15 about six months to be able to do it. Ultimately -- or what I
16 would say, to begin with, I think the defense probably knew
17 that when they dropped that into the funnel, that was going to
18 jam up the process. It did for some period of time, but the
19 documents were never going to come out any less than SECRET at
20 that point in time. That was the minimum they are going to
21 come out on the other end because of a program, and that's the
22 way it turned out.

23 MJ [Col PARRELLA]: So Judge Pohl commented on the record

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1 about how, as this case progresses to trial, things are going
2 to need to speed up. Whether it's sped up a little bit or not
3 depends on I guess what view you have, but -- and I think that
4 the parties did sort of agree with respect to the arguments in
5 551. The commission sort of followed the recommendations of
6 the parties, issued its order, and hopefully that has had some
7 progress in speeding things up.

8 TC [MR. SWANN]: Let me address that because I paid a lot
9 of attention to what goes on the website and all of that.

10 It has sped up considerably. If you just simply look
11 at the website, I mean, when you issue an order, it's out
12 maybe the next day, right? It doesn't need much of a
13 classification review. Others take a little bit longer.

14 You have told us to get 806s onto the website.
15 They're there; for all practical purposes, I think everything
16 for most of 2018. I review the record of trial in this case.
17 I have been authenticating it for the judge over time, and I
18 pay particular attention to what I am looking at and what is
19 on the website. There are redactions. No doubt there are
20 going to always be redactions from these 806 sessions, but it
21 has sped up considerably.

22 Now, remember now, back when we were talking about
23 the funnel, the funnel was competing with other interests that

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1 the United States had with respect to getting out documents to
2 the defense so they could do their job. The 542 discovery,
3 the discovery that was related to earlier iterations that
4 required the court to do a heck of a lot of work, and that
5 has, I think you have seen, kind of dwindled down to not a
6 lot, but we are getting that out. That is a competition. But
7 back in that period of time, the competition was great, and
8 therefore there were competing interests.

9 So now with respect to 551, they have more assets
10 dedicated to getting that process moving. They took your
11 order seriously, they have dealt with it, and they are doing
12 their best. They have more assets available to it. There are
13 more assets available to get other things out.

14 So me looking at this, I would say that it has sped
15 up considerably. That 18,000 that was dumped into the
16 system -- well, three years ago I guess now -- it did clog
17 things up for a while and then it got kicked out.

18 MJ [Col PARRELLA]: So assuming the goal now is to focus
19 not on speed at which it might get posted to the website but
20 specifically looking at the speed at which if the defense has
21 a filing they want to get a security classification review,
22 getting it back in a timely fashion so they can file it, the
23 defense is asking for security classification guides as one

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1 potential solution to help speed that up, what is the
2 government's position if, you know -- your position is
3 obviously they shouldn't get the security classification
4 guide. What's the government's sort of alternative solution
5 to speeding up that process?

6 TC [MR. SWANN]: Well, first of all, I don't think the
7 classification guide is going to do much for them. You talked
8 about that. The words like "mosaic effect." It cannot
9 address every circumstance that comes up. We had this problem
10 with the 018TT, 00 series where there was a filing that
11 ultimately resulted in a spill, and then they -- we went back
12 through the process and the OCA determined that because of
13 this mosaic nature of what was occurring in that instance,
14 there were -- there was a spill.

15 A security classification guide could never address
16 those kind of instances. That's the OCA taking a look at it,
17 taking everything that that particular person knows and
18 applying their best information to how to mark it.

19 So is the process moving faster? I don't know what
20 they do, okay? But I have seen no indication to me that it is
21 stopping them from filing items. None at all.

22 MJ [Col PARRELLA]: What's the government's position as to
23 whether the commission should have access to these security

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1 classification guides, [REDACTED]

2 [REDACTED]

3 TC [MR. SWANN]: Sir, I think we give you enough guidance
4 in this particular area, but if the court -- I mean, obviously
5 I'll follow whatever order the court and -- will do. I mean,
6 at some point in time, we had Judge Pohl look at one. He
7 decided it wasn't relevant and material. And then this other
8 guide that we are talking about here, if that's what the court
9 wants, we will take a look at the order and see what we can
10 do.

11 MJ [Col PARRELLA]: Thank you, Mr. Swann.

12 TC [MR. SWANN]: Yes, sir.

13 LDC [MR. CONNELL]: Your Honor, there are many things that
14 the prosecution does that I have no insight into whatsoever.
15 I don't know their process, I don't know how it works, I don't
16 know who works on it, what happens.

17 Clearly the opposite is true as well, because the
18 representations that the government just made about the way
19 the process works require correction. The government just
20 represented to the military commission that there is a
21 separate process from the classification review process [REDACTED]

22 [REDACTED] That is unequivocally
23 untrue.

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1 The process is actually already a matter of record in
2 this military commission, and it is found at AE 118 (AAA Sup)
3 Attachment B, which is the process established on 6 June 2003
4 by the convening authority for classification review.

5 It provides that the defense shall hand-deliver a
6 written request to the director, Office of Special Security,
7 Washington Headquarters Service -- that's the POC that Mr. --
8 that the government just mentioned who is mentioned in their
9 606 filing -- it's Ty Bumpus at this time -- or a
10 representative of that office who will coordinate with the
11 original classification authority of the information or other
12 appropriate agency, as necessary, regarding the appropriate
13 classification.

14 That is the only process. It was ordered by the
15 military commission in Protective Order #1, originally in
16 AE 013P. It was implemented by the convening authority first
17 on -- first there was an earlier version in 2012, and the
18 June 6, 2013, is the current version.

19 The way that it actually works is that we take a
20 document and, as I said, except for the 509 et seq. situation,
21 generally those are documents that the prosecution has never
22 seen and may never see. They are internal defense documents
23 that we are seeking classification guide for -- classification

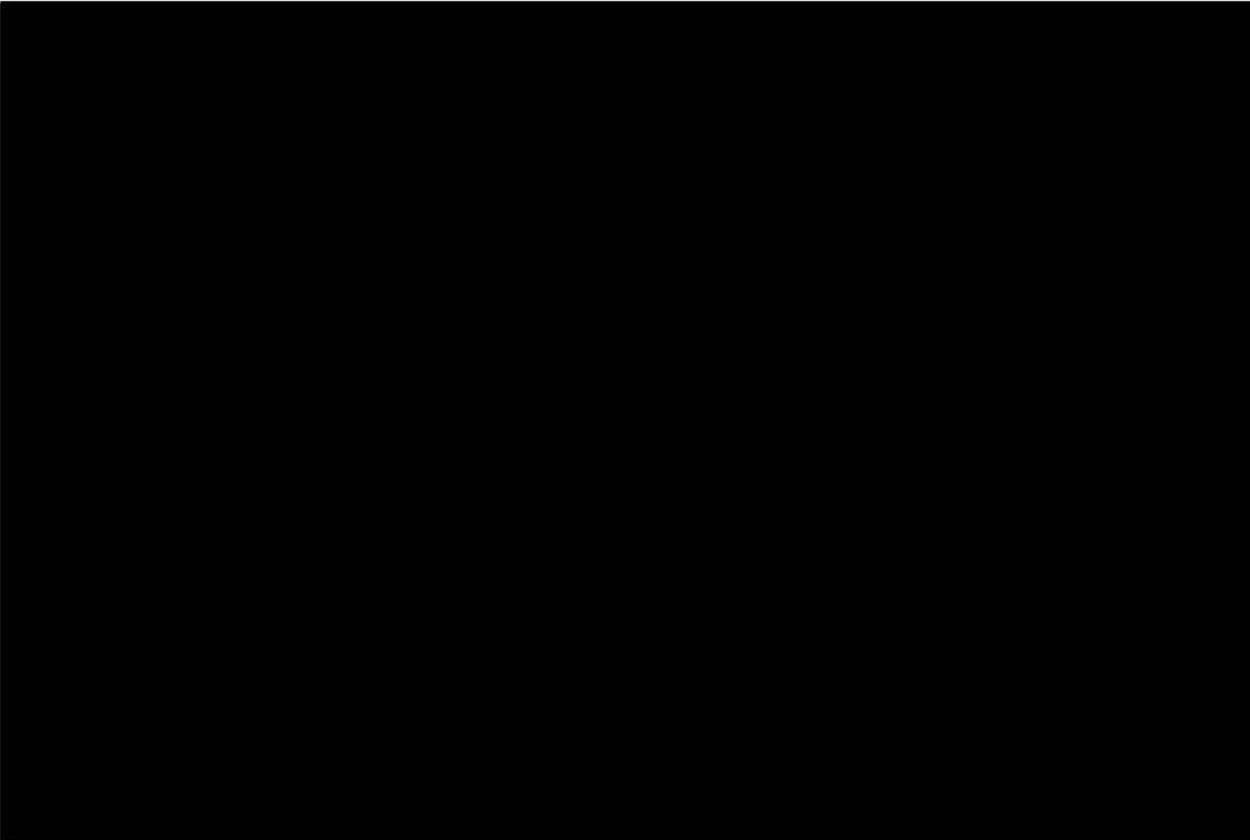
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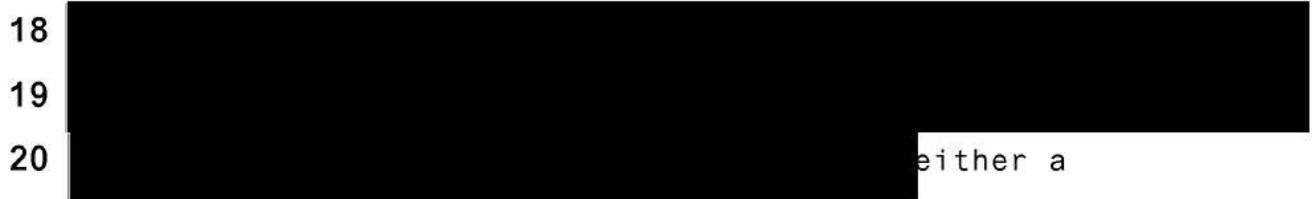
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1 review for, because we don't know.

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15 One of the reasons we asked is because we often ask,
16 you know, hey, it has been a year. Can we have our document
17 back? And they go, well, it's with the fourth of five OCAs,



20 either a
21 compilation note from an OCA -- that compilation note might
22 be, for example, this is an open source document, and we
23 refuse to review it, or the compilation note might be -- might

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1 be guidance, sort of in the way that the prosecution produces
2 guidance. This part of it is classified, this part is not,
3 but if you put it in a pleading, it is, for example, is the
4 kind of guidance we get. Or they will re-mark -- they will
5 mark paragraphs, which is what I like the best because then
6 they tell us what the answers are if they mark the paragraphs.
7 But they just hand-write paragraphs on there. Sometimes we
8 even file those with the military commission so I am sure they
9 are in the record.

10 So that's the way that process works. The idea that
11 there is a telephone call or a meeting in a secure space or
12 any kind of access where the DISO even knows the identity of
13 even the agency, even the three letters of what OCA is
14 reviewing it, is inaccurate. There is certainly no separate
15 process. There is certainly no -- and I wrote down this
16 quote [REDACTED]

17 MJ [Col PARRELLA]: So this all sounds -- I can understand
18 the defense's sort of frustration and why we are here.

19 LDC [MR. CONNELL]: Yes, sir.

20 MJ [Col PARRELLA]: My question is, assuming that the
21 security classification guide resembles something akin to what
22 was litigated in 054C, it doesn't seem that it is going to
23 offer you much solace in this process that is very time

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1 consuming to get a document reviewed.

2 So is a security classification guide really what you
3 are after or is there some other remedy here that you are
4 looking for the commission to fashion to speed this up?

5 LDC [MR. CONNELL]: Legitimate question, sir, and I'll
6 give a few different answers. The first is, I don't know the
7 answer to that question. I do know that in 054C, Judge Pohl
8 said that he reviewed [REDACTED] which is at the -- listed as
9 the source of derivation of 606 Attachment B just like it was
10 probably some other document. I'm sure that's where I got
11 it -- right? -- that I saw it derived from and thought, oh, my
12 goodness, there must be a classification guide.

13 I described this in open court as some kind of a
14 grandparent process which I thought probably, in echoing what
15 you are saying now, my uninformed inferential belief is that
16 probably that [REDACTED] is a very general document that would
17 not provide additional information.

18 I do know that there are a number of organizations,
19 the Department of Defense Security Classification/Security --
20 Declassification Review Team, the SC/DRT that was mentioned
21 earlier is routinely in the business of making granular
22 assessments -- as far as I know, they are not an original
23 classification authority, they are derivative authorities who

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1 make granular assessments about orders from the military
2 commission, pleadings from the defense. They -- they have
3 something that they have to apply.

4 I do know that routinely when we seek to file
5 documents, our first step -- classified documents, our first
6 step is the court information security officer. They may be
7 flying as blind as we are; I don't know. That may be true
8 from some of the comments that the military commission made.
9 But I do know that there is someone somewhere in order for
10 this -- who has a policy -- and so hope springs eternal --
11 could summarize that first element.

12 The second is, I do not think that it is a good idea
13 to make the perfect the enemy of the policy. The Executive
14 Order 13526 requires the existence of security classification
15 guides and it requires derivative classifiers such as the
16 defense to apply them.

17 There is a -- there is a sense in which my hope and
18 faith in my government makes me think that things work, you
19 know, more or less the way they are supposed to and that there
20 is a security classification guide that has a sufficient level
21 of specificity to serve the purposes of uniform
22 classification, which is exactly the opposite of the
23 government's argument that we are trying to reduce the

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1 classified -- I can't reduce the classification of anything,
2 right? I am trying to apply the proper classification that an
3 OCA has decided. The way the OCA communicates that to me is
4 one of two ways: One of them is a security classification
5 guide which is intended to be prospective and the other is
6 ad hoc guidance such as what we receive here.

7 The -- but to answer your ultimate question is, when
8 I initially advocated for the -- and it was me personally,
9 when I initially advocated for the classification review
10 process, I had much higher hopes for it than it has worked out
11 to be. Right. The government is very fond of discussing the
12 large pending classification review submission which was at
13 issue in AE 397. That may be, in fairness to them, because
14 that's the only one they have insight into because it was
15 discussed in open court.

16 It was also a highly -- I was not personally
17 involved, our team was not involved, but it was also a very
18 specific situation where the government had -- had -- contrary
19 to the DoD Manual, had produced documents marked PENDING
20 CLASSIFICATION REVIEW without submitting them for
21 classification review. And I believe that one of the teams
22 said, well, they have to be submitted for classification
23 review, so that's what we are going to do. But that's not the

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1 ordinary case by any means. The ordinary case is a document
2 of between 3 and 20 pages, and it still takes an unbelievably
3 long time to get that classification reviewed.

4 So what you are saying -- I'm sorry, I think your
5 actual question is, although it's not briefed, would a --
6 would guidance as to what the military commission considers to
7 be appropriate time limits -- not limits, time posts for
8 classification review be of -- help clean up this process?
9 Yes, it absolutely would.

10 I know that -- the military commission's views on its
11 ability to tell other agencies what to do, but at the very
12 least, expectations could be set. And I'm not asking for,
13 like, one-week turnaround. I mean, I'm not asking for that
14 level of expectation. But with respect to other things, we
15 have 14- and 28-day markers that have certain aspects to them.
16 You know, the military commission's 551 order set a 15-day
17 marker. You know, there are expectations that could be set by
18 the military commission.

19 Does that answer your question?

20 MJ [Col PARRELLA]: It does, but I have another one.

21 LDC [MR. CONNELL]: Yes, sir.

22 MJ [Col PARRELLA]: With the benefit now of -- you talked
23 about your higher hopes. But with the benefit now of years of

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1 experience, what do you deem to be a reasonable amount of time
2 for a classification security review, taking into account, you
3 know, the realism of what's involved in that process and the
4 fact that the government and these OCAs have other things as
5 well to do?

6 LDC [MR. CONNELL]: Right. 60 days. I do want to address
7 the other things to do because obviously -- well, there are
8 lots of agencies that have lots of things to do that have
9 nothing whatsoever to do with me and my little document.

10 MJ [Col PARRELLA]: I understand.

11 LDC [MR. CONNELL]: But the idea that the government just
12 articulated about competition within the funnel is very -- if
13 it is true, is very frightening to me, because we have been
14 assured that our reviews at the CIA are conducted by two
15 individuals who do not have other -- who are walled off and do
16 not have other classification review duties.

17 So if the government -- the government just argued
18 that, for example, what I put into this classification review
19 process is competing with documents at the SC/DRT which are
20 going on the website. I don't believe that to be accurate.
21 But if it is accurate, it is quite concerning because that
22 would -- that would have broken down the walled-off process
23 that Judge Pohl attempted -- you know, his original walling

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1 off in AE 013P is somewhat aspirational. And I acknowledge
2 that, right?

3 I mean, at the time, he said, look, I can't control
4 the internal workings of the CIA. I can ask them to do --
5 make every effort to respect the confidentiality of
6 attorney-client material, but that's the best I can do. And I
7 think that you could make similar aspirational time posts with
8 respect to classification review.

9 MJ [Col PARRELLA]: In your description of how the process
10 actually works, you describe WHS as sort of a courier in
11 between your DISO and the OCA. Do you see that as much of a
12 hindrance in time or, you know, in other words, would it
13 assist for the DISO to have direct ability to contact somebody
14 at the OCA and discuss it? Maybe it doesn't require a formal
15 submission of something in writing; maybe it's a simple
16 question in a secure telephone call or something along those
17 lines.

18 LDC [MR. CONNELL]: Absolutely, Your Honor. That is --
19 that would be -- would speed up this process so much that it
20 is something that I dared not hope for. Yes, that -- and I'm
21 not saying that -- I don't know who the agency would appoint
22 to be that point of contact, but the point of contact that the
23 government describes saying, oh, the defense has point of

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1 contact, is Mr. Bumpus, who does a great job, works very hard,
2 has a lot of things that he has to do but is not an OCA, and
3 is, at best, a courier when it comes to this particular
4 aspect.

5 Having some actual point of contact would be
6 extremely valuable.

7 MJ [Col PARRELLA]: Thank you, Mr. Connell.

8 LDC [MR. CONNELL]: Thank you. Can I -- I just wanted to
9 mention just one other -- two other things -- three other
10 things, I'm sorry, just so it is clear.

11 One of them is I cannot agree with the government
12 that the accused possess information which is classified
13 within the meaning of home control or produced by the United
14 States, but it is true that gray area is quite large because,
15 as I have described in the 524 context, at least until the 524
16 prohibition, Protective Order #4 went into effect, and outside
17 the prohibitions of that protective order since then, we
18 talked to an awful lot of people with information about the
19 RDI program or aspects of the RDI program.

20 I don't know if it's as many as 200, but it's more
21 than a hundred; it's a lot. So we take in open-source
22 information from witnesses and have to address it, and it
23 comes with no markings whatsoever.

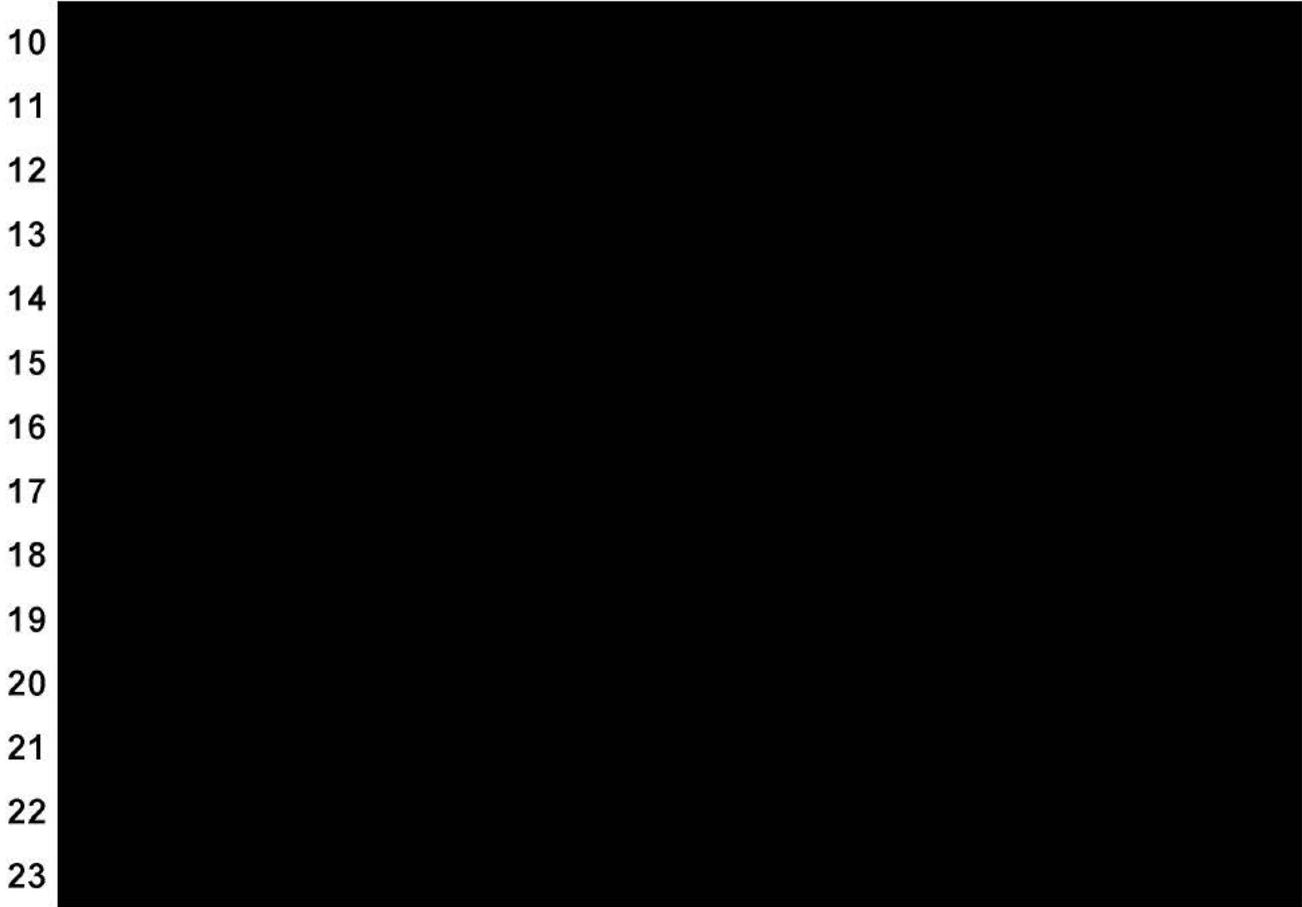
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1 The second additional point that I wanted to make was
2 that I wanted to agree with the government that your order in
3 551 has had an effect and that both in our personal
4 experiences and in talking to interested members of the public
5 we have seen the DRT, or whoever does it, making significant
6 efforts, a lot of working around getting unclassified
7 documents especially onto the website faster, and we
8 definitely appreciate that.

9 The last thing that I wanted to say was you mentioned



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1 [REDACTED] Thank you.

2 MJ [Co1 PARRELLA]: Thank you.

3 Any other counsel wish to be heard on 118? Okay.

4 Mr. Connell, is it your intent to take up the -- all
5 related motions in the same order that we did yesterday?

6 LDC [MR. CONNELL]: With the court's permission.

7 MJ [Co1 PARRELLA]: Okay. And with respect to 599,
8 Ms. Bormann, are you prepared to make argument on 599?

9 DC [MR. MONTROSS]: I will address that, Your Honor, and I
10 will wait until after Mr. Connell goes in 600 and 601 and 574.
11 They're all related.

12 MJ [Co1 PARRELLA]: Okay.

13 DC [MR. MONTROSS]: Assuming you're okay with that,
14 Mr. Connell.

15 MJ [Co1 PARRELLA]: I am. So why don't we go ahead and do
16 this before you begin, because these are related. Let's go
17 ahead and take just a 10-minute recess.

18 The commission is in recess.

19 [The R.M.C. 806 session recessed at 1015, 26 March 2019.]

20 [The R.M.C. 806 session was called to order at 1029, 26 March
21 2019.]

22 MJ [Co1 PARRELLA]: This commission is called back to
23 order for this session pursuant to R.M.C. 806. All parties

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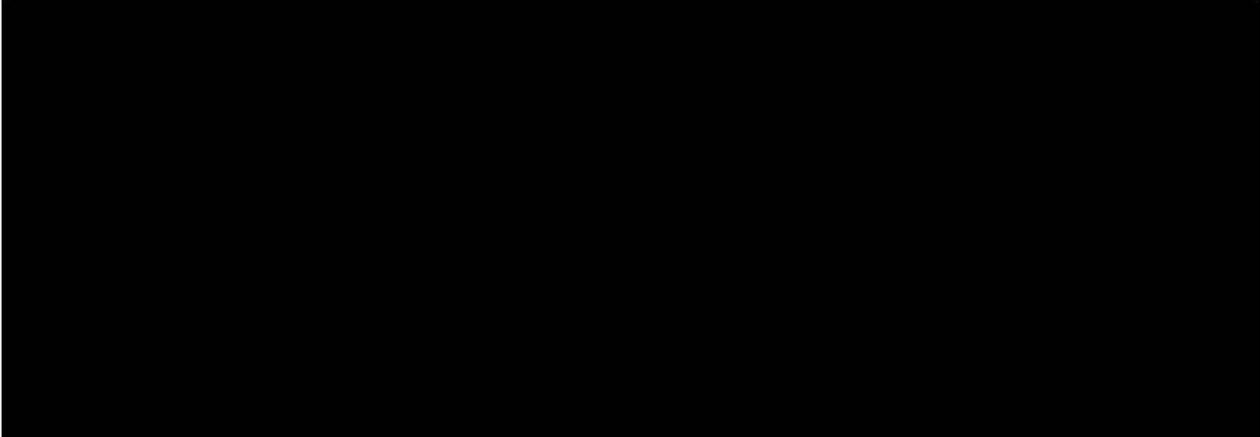
1 present when the commission recessed are again present with
2 the exception of Ms. Radostitz, who has stepped out. Okay.

3 Mr. Connell, the floor is yours.

4 LDC [MR. CONNELL]: Thank you, sir.

5 The issue before the military commission is AE 601.
6 I was able to discuss, using unclassified paragraphs, the vast
7 majority of AE 601, but there are a few additional points that
8 need to be made on the high side.

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16 But I do want to explore -- to explain the scope of
17 that order as I see it just a little bit more, which is
18 because paragraph 6.a., the first provision of the protective
19 order, is actually even broader than was described in the FOUO
20 paragraph, which said that 

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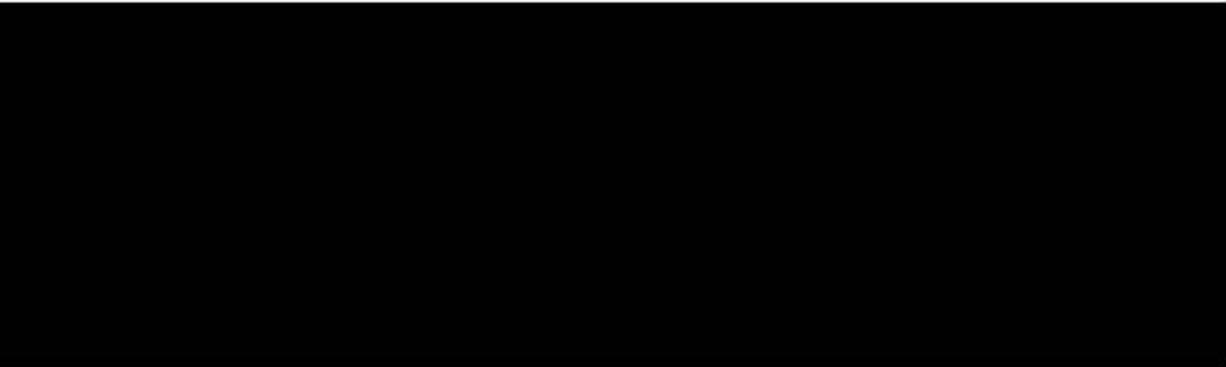


MJ [Co1 PARRELLA]: Mr. Connell, could you hold one second, please?

LDC [MR. CONNELL]: Yes, sir.

MJ [Co1 PARRELLA]: Okay. Thank you. You may continue.

LDC [MR. CONNELL]: Thank you.



In addition, the full SECRET [redacted] version of the paragraph goes on to emphasize its breadth in the second paragraph which is [redacted]



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[REDACTED]

The second provision found in 6.b. is even broader in many ways than subparagraph a. [REDACTED]

[REDACTED]

Three observations to make on this. First, of the three paragraphs, this is the only one which includes a --

[REDACTED]

The way that I read this in conjunction with subparagraph a. is that in no session can we talk about how [REDACTED] -- can I give my hypotheses as to how

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1 [REDACTED] but in a closed session, I could
2 give my hypotheses about [REDACTED]

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5 The second -- so that actually is the second thing;
6 that it's much broader in its scope in that [REDACTED]
7 [REDACTED] not simply ones that are about this
8 particular -- [REDACTED]

9 But then third, and I wanted to draw your attention
10 to this in relationship to the questions, there was a thread
11 that the military commission and I went down about a road at
12 which some sort of substituted evidentiary foundation that
13 would satisfy all the concerns of all the parties, there might
14 be -- that might lie at the end of a road.

15 And I mentioned in the course of that conversation
16 that there seemed to be a fact that was of particular
17 significance to the government that was of less significance
18 to me, as an example.

19 In the last phrase of paragraph b., it talks about a

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22 Now, I could speculate, were it not for the
23 protective order, why that -- [REDACTED]

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1 might be important to sources and methods national security in
2 that [REDACTED]
3 [REDACTED] for example, is not something that is
4 significant to the points that I wish to use this information
5 to make in a defense.

6 So I raise that as an example, and I'll show you that
7 it appears in subsection c. as well. So subsection c. says

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12 So given that that's the only feature that appears
13 twice in this protective order, it led me to believe that that
14 might be the focus of the government's concern, and, you know,
15 is an example of through -- of a process which negotiation or
16 compromise might yield some other solutions. I just wanted to

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about that.

19 And unless you have any other questions, that's all I
20 have with respect to 601.

21 MJ [Col PARRELLA]: I do. So based on some of the
22 government's argument in the open session, they sort of
23 indicated that their focus was on [REDACTED] You

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1 just articulated that you read 6.b. to be broader than that.

2 Has there been any discussion with the government to
3 clarify the scope of what was intended in 6.b.?

4 LDC [MR. CONNELL]: No, Your Honor. I could do that.

5 MJ [Co1 PARRELLA]: And then with respect to 6.a., the
6 same question: Any discussion as to whether this prohibition
7 applies to argument in closed session?

8 LDC [MR. CONNELL]: Offline, Your Honor, you mean?

9 MJ [Co1 PARRELLA]: Correct. Like, in other words, based
10 on your reading, did you ----

11 LDC [MR. CONNELL]: No.

12 MJ [Co1 PARRELLA]: Okay. So we will find that out, I
13 guess, shortly.

14 LDC [MR. CONNELL]: Yes, sir. But I do want to be clear,
15 I am perfectly willing to do that. You know, you may gather
16 that as the case -- there was a time in the case when
17 government agencies were much more willing to talk to me than
18 they are now. You know, over time, positions have hardened on
19 both sides of this, and I recognize that. I have taken the
20 earlier military commission comments along that line to heart.

21 You know, at some point you would like to -- you feel
22 like you should stop beating your head against the wall, but
23 sometimes you have just got to beat it against the wall

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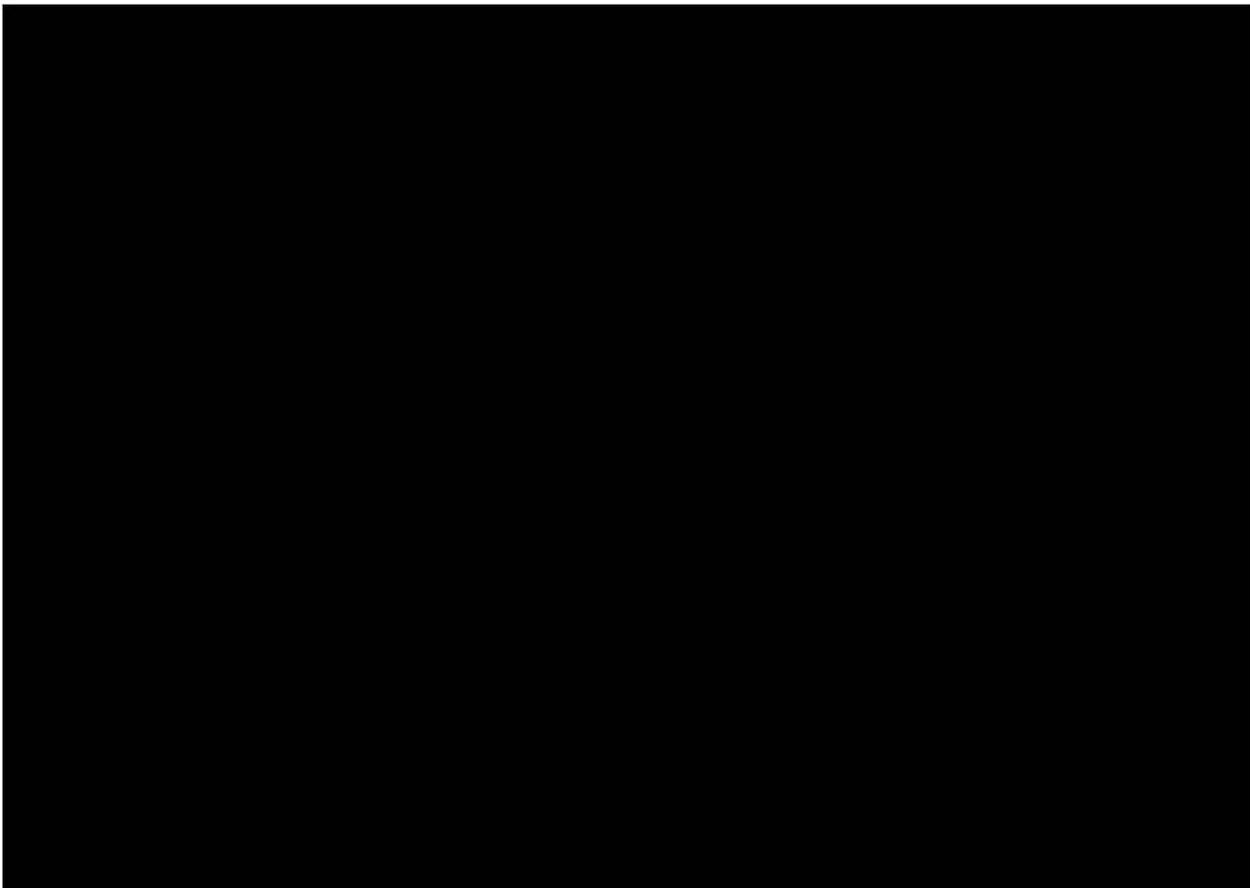
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1 anyway.

2 MJ [Col PARRELLA]: So when discussing stipulations, do
3 you think that all of the accused's interests would be the
4 same with respect to what might be important or not important?
5 It would seem to me that there would be maybe some competing
6 interests with respect to the interests of each defense team.

7 LDC [MR. CONNELL]: I don't speak for anyone else. I see
8 essentially three -- but to answer the question, and everybody
9 else can answer it the way they want to, essentially I see

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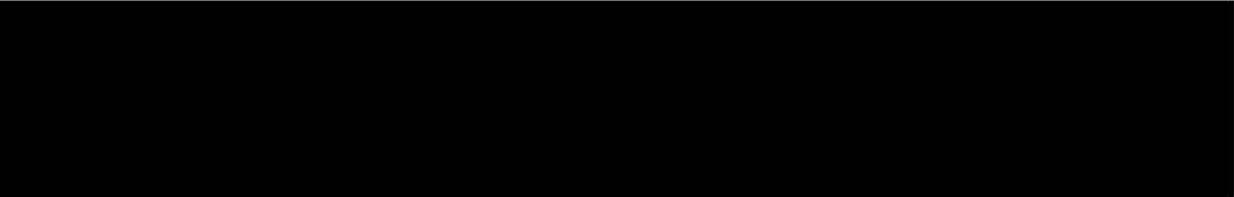


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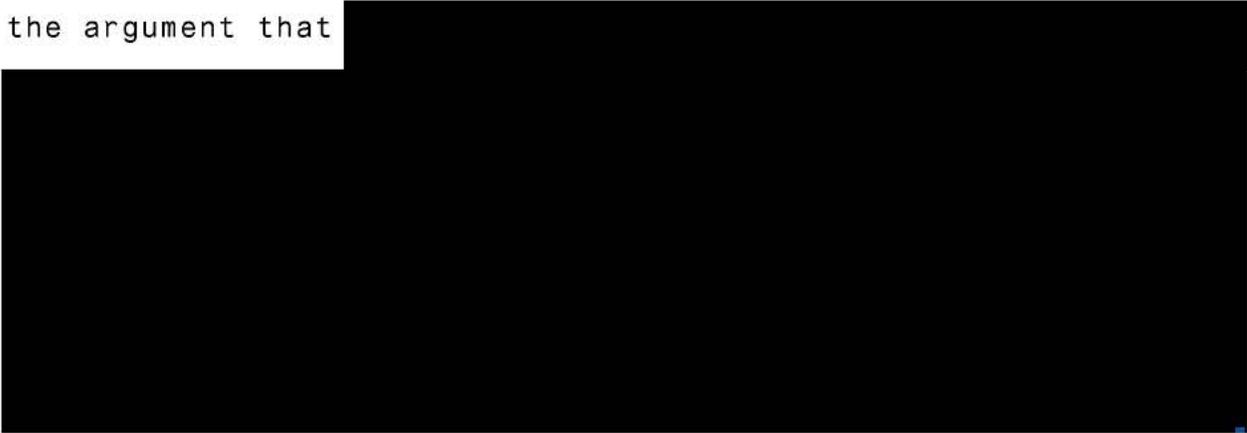
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So if the point is are the interests of the defendants necessarily uniform? No. But I will say that the place where Mr. Bin'Attash's interests diverges from Mr. al Baluchi's interests, for example, they still overlap in that if I were Mr. Bin'Attash's attorney, I would want to make the argument that



[Pause.]

MJ [Col PARRELLA]: Okay. Just for the record, it appears to be a brief interruption while we saw who was at the door of the courtroom, and we are ready to resume.

LDC [MR. CONNELL]: Just to finish that thought, Your Honor. Mr. al Baluchi makes a version of the same argument that, you know, how important could he be? How important -- how big a player in this conspiracy could he be, whether

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1 that's for accessory liability or whether that's for
2 sentencing on a relatively minor role? [REDACTED]

3 [REDACTED]

4 So the arguments are parallel; they are not exactly
5 the same, but their interests do not diverge in the way that,
6 say, coconspirators accusing one another have interests that
7 diverge.

8 MJ [Col PARRELLA]: With respect to the argument you made
9 yesterday about needing to know the scope of the universe --
10 and I understand the argument that is associated with that and
11 essentially how it affects your individual client -- is that
12 an area that the defense would be amenable to stipulation?
13 That's part A of the question.

14 Part B would be if the government were also willing
15 to and you were willing to, would that change the perspective
16 of the need of the discovery?

17 LDC [MR. CONNELL]: So the first -- with respect to the
18 first question, yes, right? There are lots of ways to present
19 evidence. Stipulation is one of those. I -- you know, in
20 fact, the military system is super interesting to me. I did
21 tell you this is my first military rodeo, but the military
22 seems to be -- put additional provenance requirements on
23 stipulations, concurrence of the defendant individually, that

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1 the civilian system in my experience generally doesn't. But
2 that's something that can be done.

3 And I'll tell you, for example, I -- the government
4 is always making these vague offers of stipulations, and I'm
5 trying to test one of those, right? I've spent hours and
6 hours and hours trying to draft a stipulation as -- to present
7 to the government on one of the other points that they have
8 made, which I'll get there eventually.

9 But with respect to the discovery piece of it, the --
10 doesn't resolve the need for discovery. And I would say it
11 has an effect on it, but it does not resolve it. And here's
12 what I mean. I mean there are two aspects of discovery that
13 even with the stipulation are important.

14 Number one, I, as an advocate, have to be satisfied
15 that the stipulation that I'm drafting is accurate; that I --
16 you know, you can't stipulate to things that are false. I
17 have to be satisfied that it's accurate.

18 The second is that I would need enough information on
19 what the universe is to be satisfied that I have adequately
20 protected my client's interests.

21 Now, the reason why I say that that -- say that that
22 affects the discovery is that is not exactly the same as I
23 have to have every piece of paper relating to this, you know,

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[REDACTED]

-- I can't -- I'm

sorry. I was beginning to speculate about sources and methods. I will stop.

The -- but I do recognize the national security interests here. I do understand that there are limit -- that there is a middle ground between a one-sentence that says the FBI acquired documents and, you know, [REDACTED]

[REDACTED] or something, right? I mean, I recognize there's a middle ground.

So I think that the discovery is a middle step on the way to a stipulation, and it might have to be an iterative middle step if the government is trying to say, look, here's what I am giving you. Is that enough? And I'll say, yeah, or no, or I need this additional thing.

So if -- I hope that answers the question.

MJ [Col PARRELLA]: It does.

I have no further questions. Thank you.

Any other defense counsel wish to be heard on 601?

LDC [MR. NEVIN]: The same objection.

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1 MJ [Co1 PARRELLA]: Ms. Bormann?

2 LDC [MS. BORMANN]: Judge, it's the same position.

3 MJ [Co1 PARRELLA]: And I take that as a negative response
4 from the defense teams.

5 Trial Counsel.

6 MTC [MR. TRIVETT]: Good morning, Your Honor.

7 MJ [Co1 PARRELLA]: Good morning.

8 MTC [MR. TRIVETT]: So without repeating a lot of the
9 arguments that we made in the open session yesterday,
10 Mr. Connell got into some more specificity regarding the
11 order. Obviously, he couldn't get into that specificity
12 yesterday in the open session because those paragraphs in the
13 order are SECRET [REDACTED]

14 But our position hasn't changed. This isn't the
15 broad gag order that Mr. Connell claims it to be. [REDACTED]

16 [REDACTED]
17 [REDACTED]

18 Alpha states that

19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]

23 We went into great detail about how much he is able

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1 to cross-examine the witnesses on, for lack of a better term,
2 2 through 7 in the list of the substituted evidentiary
3 foundation, but we did assert the national security privilege
4 over the sources and methods by which we acquired it. That
5 would apply in both open and closed courts.

6 The concern is that they'd chip away, by eliciting
7 information from witnesses or by raising it in court because
8 they talked to the accused. Now, all of a sudden, one of the
9 other defense counsel whose accused might not be aware of the
10 source and method start to learn things. And then now, just
11 under regular principles of need to know, we are starting to
12 chip away at learning what the source and method was by which
13 we obtained it.

14 So we sought the protective order that we sought.
15 It's set forth here. But obviously our interpretation
16 matters. We were the drafters. And to interpret this in any
17 way to mean any other outside source or method, most of which
18 would be independently classified anyway, but isn't subject to
19 this gag order. It might be subject to other protections of
20 classified information and 505(g) notices and other things
21 that typically classified information is, but it simply does
22 not apply to this order for this set of documents and for this
23 part of the presentation of the prosecution's case in chief.

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1 So that's our interpretation.

2 MJ [Co1 PARRELLA]: Your interpretation is this Protective
3 Order #3 pertains only to [REDACTED] at issue in the 574
4 series?

5 MTC [MR. TRIVETT]: Correct, which would include the
6 source and methods by which that was obtained.

7 MJ [Co1 PARRELLA]: Correct. I understand.

8 MTC [MR. TRIVETT]: Yes, sir.

9 MJ [Co1 PARRELLA]: Okay. And what about the prohibition
10 on discussing the material in a closed argument such as this?

11 MTC [MR. TRIVETT]: Right. And to reiterate, the
12 protective order does protect against that, because we are
13 protecting by all means the source and method by which we
14 obtained it, and we don't want this ability to chip away.

15 The more questions, the more we discuss, the more
16 things are shared with defense counsel, the more things that

17 [REDACTED]
18 [REDACTED] -- and this is in the case law -- is they
19 take a little piece of information here and they take a little
20 piece of information here, and pretty soon they're creating a
21 mosaic, and pretty soon they have an understanding of what
22 that source and method is. So we are trying to protect that
23 source and method at all costs.

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1 We have provided the information to the military
2 judge to ensure that the evidence was reliable, admissible,
3 and otherwise fair. And we do believe that it's [REDACTED]

4 [REDACTED]
5 [REDACTED]

6 Subject to any additional questions.

7 MJ [Co1 PARRELLA]: I have none. Thank you.

8 CP [BG MARTINS]: Your Honor, I just wanted to clarify
9 because it came up a couple of times in conversation relating
10 to the additional compensatory control measure, [REDACTED]
11 [REDACTED] ACCM.

12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
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21 [REDACTED]
22 [REDACTED]

23 MJ [Co1 PARRELLA]: Thank you. Okay.

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1 Mr. Connell, we're going to have to take a brief
2 recess. We are having some technical difficulties here that
3 we need to remedy. So I just ask everybody not to go too far
4 because as soon as we get it resolved, we will start over
5 again.

6 The commission is in recess.

7 [The R.M.C. 806 session recessed at 1052, 26 March 2019.]

8 [The R.M.C. 806 session was called to order at 1057, 26 March
9 2019.]

10 MJ [Col PARRELLA]: The commission is called back to
11 order. All parties present when the commission last recessed
12 are again present. It appears we have got our technical
13 difficulties resolved. Apologize for that.

14 And, Mr. Connell, the floor is yours again.

15 LDC [MR. CONNELL]: Sir, I promise you that I will have
16 technical difficulties at some point.

17 The -- so with respect to the meaning of the order,
18 with respect to 6.a., we have nailed down, I believe, through
19 colloquy with the commission, that "during any session" does
20 mean during any session; and that the government's invocation
21 of classified information privilege prevents us from making
22 arguments either in closed -- classified or unclassified,
23 closed or open session.

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1 The -- and that, I believe, is what the government
2 means when it says that it is willing to protect these sources
3 and methods at all costs. And that phrase, "at all costs," is
4 what drives the sanction process that I closed with in my
5 argument on -- in open session, about if the -- if you decide
6 that this information is important to the defense and if you
7 decide that the government has exercised its choice to protect
8 that information despite its importance to the defense, there
9 are sanctions.

10 We have been through some version of that, and we may
11 be through another version of that in 524. We have been
12 through it in other places, but that's the way -- it has
13 always been my position that the government gets to pick
14 what's more important to it. These sources and methods or a
15 trial or aspects of a trial, right?

16 The answer might be they can't use this evidence,
17 right? The -- but it's the government's decision as to
18 whether to invoke classified information privilege in this
19 sense, right?

20 I do want to digress for a second. Invoking
21 classified information privilege has a couple of meanings,
22 right? Every time we do a 505 substitution, every time
23 there's a 505(h), there is a limited invocation of classified

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